Supreme Court, U. S.
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RODAK, JR., CLERK

77-1747

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

[redacted]

NATIONAL LAND FOR PEOPLE, INC.
Petitioner,

vs.

THOMAS S. KLEPPE, ET AL.,
Respondents.

AND

RICHARD CHAVARRIA, ET AL.,
Intervenor-Respondents.

[redacted] PETITION FOR WRIT OF CERTIORARI
to the
UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA

[redacted]

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Fresno Daily Legal Report 3923 — 5-10-78

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

NOS. 76-2027 AND 76-2028

NATIONAL LAND FOR PEOPLE, INC.
Petitioner,

VS.

THOMAS S. KLEPPE, ET AL.,
Respondents.

AND

RICHARD CHAVARRIA, ET AL.,
Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner NATIONAL LAND FOR PEOPLE, INC. respectfully requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia entered on January 20, 1978.

ORDER BELOW

The January 20, 1978 order of the United States Court of Appeals for the District of Columbia vacated the judgment of the United States District Court for the District of Columbia entered on August 13, 1976 and directed the District Court to dismiss the entire action as moot pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). On January 26, 1978, the District Court ordered that the action be dismissed pursuant to the order of the Court of Appeals for the District of Columbia.

The vacated District Court order was a preliminary injunction 1) directing defendants to initiate public rulemaking proceedings in compliance with the Administrative Procedure Act regarding criteria and procedures for Bureau of Reclamation approval of "excess land" sales under the federal reclamation law, 2) enjoining defendants from approving any contracts or proposals for sales of any "excess land" in the Westlands Water District pending promulgation of final regulations, and 3) ordering defendants to submit monthly progress reports to the court on the rulemaking proceedings. 417 F. Supp. 449 (D.D.C. 1976).

The orders referred to above are attached as Exhibits A, B, and C in the appendix to this petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based upon 5 U.S.C. §701-706, 28 U.S.C. §1346, and 43 U.S.C. §371 *et seq.*

STATUTES INVOLVED

Federal Reclamation Laws

Reclamation Act of 1902, ch. 1093, §5, 32 Stat. 389, 43 U.S.C. §431.

Omnibus Adjustment Act of 1926, ch. 292, §5, 46 Stat. 368, 43 U.S.C. §423e.

Administrative Procedure Act

Administrative Procedure Act, Pub L. No. 89-554, 80 Stat. 383, 5 U.S.C. §553.

QUESTION PRESENTED

Whether the entire case at bar is moot, where defendants have partially complied with the first requirement of a preliminary injunction entered against them, and have stated that they will comply with the second part of that injunction, but where full compliance has been indefinitely delayed and jeopardized by an intervening injunction entered against defendants in a related court action.

Petitioner asserts that not only does a very live controversy exist between the parties but that petitioner's interest in enforcement of federal reclamation laws is seriously and unfairly impaired by dismissal of this entire action.

STATEMENT OF THE CASE

In 1902 Congress passed the Reclamation Act to provide for federal construction of irrigation works to benefit family farmers. As the first Commissioner of the Reclamation Service stated,

> The object of the Reclamation Act is not so much to irrigate the land as it is to make homes . . . it is to bring about a condition whereby that land shall be put

into the hands of the small owner, whereby a man with a family can get enough land to support that family . . .[1]

To accomplish this purpose, the Reclamation Act requires that:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. 43 U.S.C. §431, June 17, 1902, c. 1093, Sec. 5, 32 Stat. 389.

The 1926 Omnibus Adjustment Act supplemented the Reclamation Act of 1902 by allowing persons to receive federally subsidized water for land in excess of one hundred and sixty acres in consideration for signing recordable contracts with the government promising to sell such excess land to eligible buyers within a certain number of years (usually ten) subject to the approval of the Bureau of Reclamation. This amendment also provided for the appraisal of excess land subject to recordable contract at a price which does not reflect the value of the federally subsidized water. *See* 43 U.S.C. §423e May 15, 1930, c. 292, Sec. 5, 46 Stat. 368.

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[1]Joint Hearings Before The Select Committee on Small Business and the Committee on Interior and Insular Affairs of the United States Senate, Ninety-Fourth Congress, First Session on "Will The Family Farm Survive in America?", Federal Reclamation Policy (Westlands Water District), July 16 and 22, 1975 at 9.

Although large growers and corporations have repeatedly attempted to have the Reclamation Act's one hundred and sixty acre limitation and residency requirement repealed or declared unconstitutional, Congress and the courts have consistently reaffirmed these important provisions. *See Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *United States v. Tulare Lake Canal Company*, 535 F. 2d 1093 (9th Cir. 1976); *Yellen v. Hickel*, 352 F. Supp. 1300 (D.C. Ca. 1972).

Much of the controversy over reclamation law enforcement has centered upon the 600,000 acre Westlands Water District in the San Joaquin Valley of California, the largest recipient of federally subsidized water in the United States. The most numerous and serious allegations of reclamation law subversion have been directed at the large growers, investors, and corporate interests owning and controlling land in Westlands.[2]

As a result of such allegations, Congress enacted legislation in 1977 providing for the establishment of a special task force to study the record of reclamation law enforcement in the Westlands Water District. The San Luis Unit Federal Task Force Report concluded that "the intent of the 1902 Act was the settlement of families on their own farms. The farming of tracts of land averaging 2,200 acres in Westlands

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[2]Hearings before the Sub-Committee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United States Senate, 86th Congress, First Session on S. 44, March 6, 1959.

Joint Hearings Before The Select Committee on Small Business and the Committee on Interior and Insular Affairs of the United States Senate, Ninety-Fourth Congress, First Session on "Will The Family Farm Survive in America?", Federal Reclamation Policy (Westlands Water District), July 17 and 22, 1975.

is not a result which is consistent with such intention . . . it is clear that to date the objective of settling families on farms which they would own and operate has not been achieved within the unit."[3]

The case at bar was initiated on May 25, 1976 by National Land for People, Inc., a group of small farmers and would-be farmers who were being deprived of the opportunity to purchase land in federal reclamation areas, particularly the Westlands Water District, because of the approval by the Bureau of Reclamation of insider land sales between large growers and corporations in violation of the spirit of the reclamation law. Plaintiff aserted that such approvals were facilitated by internal rules and regulations governing excess land sales which were promulgated in violation of the Administrative Procedure Act. Public rulemaking proceedings which complied with the Administrative Procedure Act, plaintiff argued, would insure that future criteria regarding approval of excess land sales would more closely conform to the purposes of the federal reclamation law.

On May 25, 1976, plaintiff moved for a preliminary injunction directing the Bureau of Reclamation to initiate public rulemaking proceedings and to suspend approval of all excess land sales in the Westlands Water District pending final completion of this rulemaking. On July 9, 1976, without opposition from plaintiff, the District Court granted the motion of several large landowners and corporations farming in the Westlands Water District for leave to intervene in the action.

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[3]Special Task Force Report on San Luis Unit, United States Department of the Interior, 1978, at 210.

The motion for preliminary injunction was argued on July 9, 1976 and the District Court reserved judgment pending the submission of additional briefs. On August 11, 1976, the Court issued a memorandum opinion and on August 13, 1976 entered an order directing the Bureau of Reclamation to initiate public rulemaking proceedings pursuant to the Administrative Procedure Act and to suspend approval of all excess land sales pending promulgation of final regulations.

Federal defendants and intervenor defendants appealed to the United States Court of Appeals for the District of Columbia from the District Court order on October 6, 1976 and September 30, 1976, respectively. On December 17, 1976, the District Court denied federal defendants' and intervenor defendants' motions for a stay of the August 13, 1976 order pending appeal. These same motions were denied by the United States Court of Appeals for the District of Columbia on January 13, 1977. Briefing of the appeal by all parties was completed on March 24, 1977.

On June 27, 1977, the Secretary of the Interior ordered a suspension of the approval of excess land sales in all federal reclamation projects pending adoption of final regulations. On August 25, 1977, the Secretary published proposed regulations governing the approval of excess land sales and announced that public comments would be received until November 23, 1977. Hearings on the proposed regulations were held throughout the west during the autumn of 1977.

On August 11, 1977 federal appellants moved to dismiss their appeal to the Court of Appeals for the District of Columbia and intervenor appellants opposed said dismissal.

On September 9, 1977, the Court of Appeals ordered the parties to submit memoranda on the question of whether argument and consideration of the appeals should be deferred to allow the Secretary of the Interior an opportunity to issue final rules. Appellee National Land For Peopie, Inc. and federal appellants responded that consideration of the appeals should be deferred; intervenor appellants argued in opposition to a deferral.

On October 21, 1977 the Court of Appeals ordered the parties to submit memoranda showing cause, if any there be, why the decision of the District Court should not be vacated and the case remanded to the District Court to be dismissed as moot.

On November 10, 1977, several large landowners, water districts, and counties filed six similar actions in the United States District Court for the Eastern District of California requesting a preliminary injunction enjoining the Bureau of Reclamation from continuing with the rulemaking proceedings pending the completion of an environmental impact statement. These cases were subsequently consolidated as *County of Fresno v. Andrus*, F-77-202-Civ., F-77-203-Civ., F-77-204-Civ., F-77-205-Civ., F-77-209-Civ. and F-77-213-Civ. On December 7, 1977, the District Court for the Eastern District of California denied both this petitioner's motion to intervene in that action and the government's motion for change of venue to the District Court for the District of Columbia for consolidation with the case at bar. On the same day the court issued from the bench a preliminary injunction restraining the government from continuing rulemaking proceedings pursuant to the Administrative

Procedure Act, or issuing final regulations, until it had prepared, publicly circulated and considered an adequate environmental impact statement, had allowed public comment on the statement, and had reconsidered the proposed regulations in light of the statement. A formal order was entered on January 4, 1978.

This petitioner appealed to the Court of Appeals for the Ninth Circuit from the order denying its motion for leave to intervene and lodged a protective notice of appeal from the order denying the motion for change of venue and the order granting the preliminary injunction on January 19, 1978.

On January 20, 1978, the Court of Appeals for the District of Columbia ordered the appeals in the case at bar dismissed as moot, vacated the judgment of the District Court, and remanded the case to the District Court with directions to dismiss. On January 26, 1978, the District Court dismissed the case as moot pursuant to the order of the Court of Appeals.

On March 6, 1978, Harris Farms, Inc., a corporation farming in the Westlands Water District and an intervenor defendant in the case at bar, filed an action in the District Court for the Eastern District of California praying for an order directing the Bureau of Reclamation to approve excess land sale applications in the Westlands Water District *before* the promulgation of final regulations and to employ the criteria and procedures found to be in violation of the Administrative Procedure Act by the District Court in the instant case. *Harris Farms, Inc., v. Andrus*, No. F-78-49-Civ. The

requested order in that case would be in direct violation of paragraph two of the vacated preliminary injunction issued by the District Court in the case at bar.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the District of Columbia has decided a federal question in a way which conflicts with decisions of the United States Supreme Court and other federal courts.

By vacating the judgment of the District Court and ordering the dismissal of the instant case as moot, the United States Court of Appeals for the District of Columbia has issued a ruling on an issue of federal justiciability which is in conflict with the decisions of this Court and other federal courts. The effect of the Court of Appeals order is to deprive petitioner's members of the vital protection afforded to them by the District Court injunction and to award a legal victory to those whom the District Court found to be in violation of the law.

Article III, Section 2 of the United States Constitution limiting the jurisdiction of federal courts to "cases and controversies" has been interpreted to require that a live controversy exist between the parties to a lawsuit. The requisite live controversy clearly exists in the case at bar.

Petitioner does not dispute that the Secretary of the Interior attempted to comply with the first part of the District Court order by initiating public rulemaking proceedings. However, he has been prevented from concluding such rulemaking proceedings, and thus from fully complying with the order, until an adequate environment impact statement has been filed pursuant to the order of the District Court for the Eastern District of California entered on January 8, 1978. That fact alone makes this a "live" case.

The vitality of the case at bar is even more obviously demonstrated by the second part of the District Court preliminary injunction enjoining the Secretary of the Interior "from tentatively or finally approving under the federal reclamation laws any contracts or other proposals for sales of any 'excess lands' in the Westlands Water District . . . until the final completion of said public rulemaking." This order is absolutely necessary to protect petitioner's interest in insuring that the excess land in the Westlands Water District will be available to small family farmers, the intended beneficiaries of the reclamation law, pursuant to regulations which fulfill the purposes of that law. Now that this entire action has been dismissed as moot the Bureau of Reclamation may begin approving excess land sales under the criteria and procedures which the District Court found to be in violation of the Administrative Procedure Act. A resumption of such approval procedures would effectively destroy the very rights which the instant suit was filed to protect.

Counsel for federal defendants has stated in his memorandum to the Court of Appeals for the District of Columbia that the Bureau of Reclamation does not intend to approve any excess land sales until final rules are issued. However, this assertion does not render the case moot. Such voluntary compliance has been consistently judged inadequate as a basis for a finding of mootness because the "defendant is free to return to his old ways . . ." *United States v. W. T. Grant*, 345 U.S. 629, 632 (1953). For example, the Secre-

tary of the Interior may change his mind at any time without legal sanction. A future administration which disagrees with the policies of the present Secretary could order the resumption of land sale approvals pursuant to the invalid regulations. Alternatively the District Court for the Eastern District of California may order the Bureau to approve such sales in *Harris Farms, Inc., v. Andrus, supra.* In light of these circumstances, dismissal of the case at bar as moot was surely inappropriate and premature.

The instant case is remarkably similar to *Green v. Connally,* 330 F. Supp. 1150 (D.D.C. 1971) in which Negro parents sued to enjoin the United States Treasury from according tax exempt status and deductibility of contributions to private schools in Mississippi which discriminated against black students. After the District Court had granted plaintiffs' motion for preliminary injunction, the Internal Revenue Service voluntarily changed its construction of the Internal Revenue Code and denied the tax advantages to all schools involved in discriminatory activities. When the government subsequently argued that the case should be dismissed as moot because of the voluntary compliance, the court disagreed, stating:

> In the first place there is ample doctrine that a defendant does not necessarily moot a case that is live in its inception by promising to conform to plaintiffs' wishes . . .
>
> We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shifting in the tides of administration, or changing perceptions of sound discretion.

The District Court's rejection of the mootness defense in that case was affirmed by this Court *sub nom* in *Coit v. Green,* 404 U.S. 997 (1971).

The case at bar actually presents a more "live" controversy than that which existed in *Green* since the political and legal pressures on the Bureau of Reclamation to resume approval of land sales are substantial. *See, e.g. Harris Farms Inc. v. Andrus, supra.*

This Court has consistently held that a party requesting a dismissal for mootness based on its voluntary compliance bears a very heavy burden. As stated in *United States v. Concentrated Phosphate Exports Ass'n., Inc.,* 393 U.S. 199, 203 (1968), the test for mootness "is a stringent one . . . Mere voluntary cessation of allegedly illegal conduct does not moot a case . . . here we have only appellees' own statement that it would be uneconomical [to continue the allegedly illegal activities] . . . Such a statement cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes." Similarly, in the instant case it is unfair to let the rights of petitioner depend upon the government's unenforceable promise in a memorandum that it will abide by the court order whether or not it is in effect.

Another reason for the judicial refusal to declare cases moot in the face of voluntary compliance is the absence of a determination of the legality of the acts in question. *See Gray v. Sanders,* 372 U.S. 368 (1963); Federal Jurisdiction to Decide Moot Cases, 94 U. PA. L. REV. 125, 139-140 (1946).

Certainly there has been no admission by the government

in the case at bar that its practice of approving excess land sales pursuant to criteria that did not conform to the Administrative Procedure Act was illegal. Barring such an admission, the Bureau of Reclamation is free to return to a system of approving sales using rules that were found to be invalid by the District Court.

Moreover, because of society's interest in the final adjudication of disputes, the federal courts will usually hear cases which are technically moot if there is a likelihood of recurrence of the challenged activity in the future or if an issue of public interest or importance is presented. *See Carrol v. President and Commissioners of Princess Anne*, 393 U.S. 175, (1968); *Moore v. Oglivie*, 394 U.S. 814, (1969); *Division 1287 of Amal. Ass. of Street, Electric Railway and Motor Coach Employees of America v. Missouri*, 374 U.S. 74, (1963); *Friend v. United States*, 388 F. 2d 579 (D.C.C. 1967); *Women Strike for Peace v. Hickel*, 420 F. 2d 597 (D.C.C. 1969); *Matthews v. Hardy*, 420 F. 2d 607 (D.C.C. 1969); *Lansden v. Hart*, 180 F. 2d 679 (7th Cir. 1950); 132 A.L.R. 1186 (1941). Hence, even if the case at bar were moot, which it most certainly is not, it would still fall within both exceptions to the mootness rule.

There can be no doubt that the issues raised by the instant action are of foremost public importance and interest. Over the past year all of the major newspapers in this country have run editorials on the rules governing approval of excess land sales. *See Los Angeles Times*, October 23, 1977; *Wall Street Journal*, September 8, 1977; *New York Times*, August 26, 1977; *Washington Post*, September 3, 1977; *San Francisco Chronicle*, August 28, 1977; *San Francisco Examiner*, August 24, 1977.

In addition, the scholarly articles on the subject have urged a liberal interpretation of the mootness restriction, particularly on appeal. Writers note that a finding that a case is *not* moot "may advance judicial economy" because the "burden on all participants, including the court systems, is less on appeal than at trial, and an appellate decision may obviate the need for future litigation which would have to proceed through the trial stage once more." Mootness on Appeal in the Supreme Court, 83 HARV. L. REV. 1672, 1967, 1692 (1970). *See also* Disposition of Moot Cases by the U.S. Supreme Court, 23 U. CHI. L. REV. 77 (1955).

CONCLUSION

The case at bar is not moot because final regulations governing the approval of excess land sales have not yet been promulgated and there is nothing to prevent defendants from lifting the suspension on approval of excess land sales in the Westlands Water District before such rules are in effect. The resumption of such approval, which was prohibited by the District Court order vacated in the instant case, would deny to petitioner the rights which this lawsuit was filed to protect. Hence, there is a live controversy. For the foregoing reasons, this Court should grant a writ of certiorari to review the decision below.

Dated, Fresno, California,
May 9, 1978.

Respectfully submitted,

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GEORGE T. FRAMPTON, JR.
Attorneys for Petitioner,
NATIONAL LAND FOR PEOPLE, INC.

APPENDIX

UNITED STATES COURT OF APPEAL

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2027

NATIONAL LAND FOR PEOPLE, INC.
a non-profit corporation

vs.

BUREAU OF RECLAMATION OF THE DEPARTMENT OF THE INTERIOR

RICHARD CHAVARRIA, *et al.*,
Appellants

And Consolidated Case
No. 76-2028

September Term, 1977

CIVIL ACTION 76-0928

United States Court of Appeals for the District of Columbia Circuit

FILED: JAN. 20, 1978

GEORGE A. FISHER
Clerk

BEFORE: McGowan and Leventhal, Circuit Judges

ORDER

On consideration of appellants' motion to dismiss appeal in No. 76-2028, the opposition thereto and of the responses to this Court's orders of September 9 and October 21, 1977, it is

ORDERED by the Court that these appeals are dismissed as moot, and it is

FURTHER ORDERED by the Court that the judgment of the District Court is vacated and these cases are remanded to the District Court with directions to dismiss. See *United States* v. *Munsingwear, Inc.* 340 U.S. 36 (1950).

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of his office permits.

Per Curiam

EXHIBIT "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL LAND FOR PEOPLE, INC.,
Plaintiff,

vs.

BUREAU OF RECLAMATION OF THE DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants.

FILED
JAN. 26, 1978
JAMES F. DAVEY,
Clerk

CIVIL ACTION NO.
76-0928

ORDER

On January 20, 1978, the United States Court of Appeals for the District of Columbia Circuit entered an order vacating the judgment of this Court and directing that this action be dismissed as moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Accordingly, it is this 26th day of January, 1978,

ORDERED that the renewed motion of intervenor Harris Farms, Inc., for modification of the preliminary injunction is dismissed as moot; and it is

FURTHER ORDERED that this action is dismissed.

BARRINGTON D. PARKER,
United States District Judge

Copies to Counsel

EXHIBIT "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL LAND FOR PEOPLE, INC.
Plaintiff,

vs.

THE BUREAU OF RECLAMATION OF THE DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants.

FILED
AUG. 13, 1976
JAMES F. DAVEY,
Clerk

CIVIL ACTION No.
76-0928

ORDER

Upon consideration of Plaintiff's Motion for Preliminary Injunction, which came on for hearing on July 9, 1976, the Court having fully considered the memoranda, exhibits, affidavits, arguments of counsel and post-hearing memoranda of all parties,

IT IS HEREBY ORDERED

That Defendants forthwith initiate public rule-making proceedings in compliance with the Administrative Procedure Act, 5 U.S.C. 553, respecting the criteria and procedures to be used by the Bureau of Reclamation, Department of the Interior, to approve "excess lands" sales under the federal reclamation laws, 43 U.S.C. 431, 43 U.S.C. 423e, and it is FURTHER ORDERED

That Defendants be, and they hereby are enjoined from tentatively or finally approving under the federal reclamation laws any contracts or other proposals for sales of any "excess lands" in the Westlands Water District, San Joaquin Valley, California that are submitted to the Bureau of Reclamation on or after August 10, 1976, until the final completion of said public rule-making ordered to be initiated in

subparagraph (A), *supra*, in compliance with the Administrative Procedure Act, or until further order of the Court, and it is FURTHER ORDERED

That the defendants shall within 30 days from the date of this order, and every 30 days thereafter until further ordered, submit to the Court a report on all steps taken pursuant to the first paragraph of this order.

No security is required of the plaintiff; the Court does not perceive that the defendants will incur any damages by reason of this order.

August 13, 1976.

BARRINGTON D. PARKER,
United States District Judge

Copies to counsel.

EXHIBIT "C"

CERTIFICATE OF SERVICE

I hereby certify that a typewritten copy of the Brief for Appellee in the above-captioned cases has been served upon the counsel listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 17th day of May, 1978 to:

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FRESNO DAILY LEGAL REPORT

By Robert C. Hollingshead